C.A. No. 03-10585
Published Opinion Filed October 24, 2005
(Bybee, W. Fletcher, JJ; Kozinski, J., dissenting)

D. Ct. No. CR 02-0773-TUC-JMR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARMEN DENISE HEREDIA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PAUL K. CHARLTON
United States Attorney
District of Arizona

CHRISTINA M. CABANILLAS
Appellate Chief

GEORGE FERKO
Assistant U.S. Attorney
405 West Congress, Suite 4800
Tucson, Arizona 85701
Telephone: (520) 620-7300
Attorneys for Appellee

Date Mailed: January 6, 2006

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

STATUTES

III. STATEMENT OF COUNSEL

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the United States, with approval of the Solicitor General, presents this petition for rehearing en banc and panel rehearing. A divided panel concluded that a "deliberate ignorance" instruction was erroneously given, and that the error was not harmless. ***United States v. Heredia***, No. 03-10585 (9th Cir. Oct. 24, 2005) (attached).

Rehearing en banc is warranted because the majority's opinion conflicts with and creates a marked deviation from this Court's prior *Jewell* cases – including *Jewell* itself. "If ever there was a case where a *Jewell* instruction is proper, this is it." (Slip op. 14548) (Kozinski, J., dissenting). By holding a *Jewell* instruction to be reversible error in, as the dissent correctly found, a paradigmatic case of deliberate ignorance, the majority's opinion converts an instruction to be given rarely into one that will henceforth never be given. Indeed, the case "creates a very dangerous precedent." (*Id.* at 14552.)

Furthermore, the majority's flawed harmless error ruling is inconsistent with precedent of this Court and the Supreme Court, particularly ***Griffin v. United States***, 502 U.S. 46 (1991), and deepens a split with several other circuits. Rehearing en banc is needed to resolve this conflict.

IV. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

The defendant/appellant, Carmen Denise Heredia ("defendant"), was convicted at trial of possessing over 100 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(vii). (CR42, 43; ER4.)[1]

B. Statement of Facts.

The defendant stopped at a Border Patrol checkpoint in February 2002 while driving a Mercury sedan from Nogales, Mexico, to Tucson, Arizona. (RT 3/11/03 46; SER 7.) The defendant's mother, aunt (Beatriz), and two of her children were in the car. (3/11/03 65-66; SER 26-27, 44.) An agent who approached the car smelled a strong perfume odor coming from inside. When a drug dog alerted to the scent of contraband in the car's trunk, the agent referred the car to a secondary inspection area. (RT 3/11/03 48, 84-85; SER 9, 45-46.) There, an agent opened the trunk and discovered 350 pounds of marijuana contained in bundles that were covered with sheets of fabric softener to mask the smell of marijuana. (RT 3/11/03 49-51, 57-62, 87-88; SER 10-11, 20-23, 48-49.)

---

[1] For citations to the record, the government will use the same abbreviations in this petition as it did in its answering brief.

The defendant gave a statement to a DEA agent after waiving her *Miranda* rights. She said she had left Tucson for Nogales via public transportation for a funeral and that for the return trip she borrowed the car from her Aunt Belia, who traveled back with her by separate vehicle. (RT 3/12/03 44-46; ER 25-27.) The defendant further stated that she suspected something was wrong when she noticed an overwhelming detergent smell upon first entering the car. She said that she asked Belia about it and that Belia explained that she had spilled detergent in the car. The defendant told the agent she did not believe Belia's explanation because she had once spilled detergent in her own car and the smell was not that strong. She also stated that her mother and Aunt Beatriz had been acting suspiciously and that she had planned to switch cars before driving through the checkpoint. (RT 3/12/03 45-46; ER 26-27.)

The defendant testified at trial. She testified that she suspected that drugs were in the car as she approached the checkpoint, based on the nervous and suspicious behavior of her mother (smoking a lot of cigarettes over defendant's objection, spraying air freshener, and opening the window) and aunt (drinking alcohol), and the fact that her mother and her mother's boyfriend, who was a drug user, carried a lot of cash despite having no jobs. (RT 3/12/03 127-128, 138, 149; ER 47-48, 58-59, 69.) The defendant claimed that by the time her suspicion convinced her to turn around, she had passed the last exit before the checkpoint. Just prior to reaching the

checkpoint, the defendant noticed that Belia had passed them on the interstate, and that her mother received a call on her cell phone. (RT 3/12/03 138-140; ER 58-60.)

At the close of the evidence, the government requested that, in addition to an instruction on actual knowledge, the jury be given a deliberate ignorance instruction based on ***United States v. Jewell***, 532 F.2d 697 (9th Cir. 1976) (en banc), which held that evidence of deliberate ignorance satisfies the statutory requirement that a defendant act "knowingly." The district court gave this Court's model instruction on deliberate ignorance:

> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.

(RT 3/12/03 185-186; ER 5.)

C. Ninth Circuit's Panel Decision.

In a published opinion, a divided panel of this Court reversed. The majority held that there was insufficient evidence to warrant the deliberate ignorance instruction, and that the error was not harmless. ***United States v. Heredia***, No. 03-10585 (9th Cir. Oct. 24, 2005) (attached).

The majority recognized its holding in *Jewell* that evidence of a defendant's "deliberate ignorance" is sufficient to meet the knowledge requirement of 21 U.S.C. § 841(a), and that a jury may be instructed accordingly. (Slip op. 14536.) The majority began by observing that a deliberate ignorance or "*Jewell*" instruction may be given only in those "willful blindness" cases where the government presents evidence that the defendant "'suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended.'" (Slip op. 14537) (quoting ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992)). The majority stated that the government was required to "identify its theory or theories of the case: if the government's evidence supports only actual knowledge and not deliberate ignorance, then it may not obtain a *Jewell* instruction." (Slip op. 14538.) It further held that the "fact that the government argued its case in the alternative affects the way we approach this appeal[,]" because "we cannot assume that Heredia would have been convicted absent a deliberate ignorance instruction." (*Id.*) Therefore, if the *Jewell* instruction was improper, "we must reverse even if we thought there might otherwise be sufficient evidence to sustain a conviction on the theory that Heredia actually knew of the marijuana." (*Id.*)

The majority concluded that the evidence did not support a finding that the defendant realized the probability that marijuana was in the car in sufficient time to

make a deliberate decision to avoid confirmation of that fact in order to deny knowledge. The majority dismissed the testimony about defendant's inquiry into the detergent smell on the ground that "mere odors are insufficient to place a defendant on notice that she might be involved in criminal activity." (*Id.* at 14540.) The majority went on to credit the defendant's testimony that her suspicion rose to a problematic level "only after she had passed the last interstate exit prior to the checkpoint, and that it was therefore too late to turn back." (*Id.* at 14543.) While defendant could have pulled the car over or reported her concerns to the Border Patrol agents, the majority dismissed those alternatives on the ground that "neither . . . constitutes a reasonable opportunity to abstain from or discontinue the suspected criminal activity." (*Id.* at 14545.) The majority thus concluded that giving the *Jewell* instruction was error. (*Id.* at 14546.)

The majority next held that the error was not harmless because the evidence that defendant had actual knowledge of the marijuana, while sufficient, slip. op. 14547, was not "overwhelming," *id.* The majority further explained that "[i]f we were to permit the issuance of the *Jewell* instruction absent specific evidence that the defendant ignored the truth in order to provide herself with a defense, the deliberate ignorance doctrine in this circuit would slide perilously close to negligence or even strict liability." (*Id.*)

Judge Kozinski dissented. He observed at the outset that "[i]f ever there was a case where a *Jewell* instruction was proper, this is surely it." (Slip op. 14548.) He explained that the case for deliberate ignorance was stronger than in many cases in which this Court had previously approved the instruction because here "defendant[] admi[tted] that her suspicions were aroused and eventually matured into a belief that there may be drugs in the car." (*Id.*)

First, Judge Kozinski found that the majority's reliance on the odor cases was misplaced because those cases provide that an odor "*without more*" is insufficient to support a *Jewell* instruction, whereas here defendant herself found the odor suspicious and disbelieved her aunt's explanation. (*Id.* at 14548-14549) (emphasis in original). In light of defendant's testimony that she found her mother's spraying of air freshener and opening the car window suspicious, "[t]he jury could have inferred . . . that [defendant] did have the specialized knowledge that heavy scents are used to cover up drug odors." (*Id.* at 14550.)

Second, Judge Kozinski took issue with the majority's crediting of defendant's testimony regarding the timing of *when* her suspicion solidified. He reasoned that "[t]he jury here was entitled to accept as true the *fact* of [defendant's] epiphany . . . but disbelieve her as to the *timing* of that realization." (Slip op. 14551) (emphasis in original). The majority's "figment that the jury was somehow bound to believe

[defendant] on this key point not only conflicts with [***United States v. Nicholson***, 677 F.2d 706, 709 (9th Cir. 1982) (trier of fact need not believe self-serving story)], it creates a very dangerous precedent." (*Id.* at 14551-52.)

Third, Judge Kozinski concluded that even if the jurors had to credit defendant's entire story, "they could still have concluded that she failed to take reasonable steps to disassociate herself from the criminal conduct." (Slip op. 14552.) He agreed with the government that defendant could have pulled over to the side of the road and insisted on traveling in her Aunt Belia's car, which "was traveling in close proximity," *id.* at 14553, or she could have "informed the border agents of her suspicions," *id.* at 14554. In the dissent's view, by remaining silent at the checkpoint, defendant "continued to aid the criminal enterprise even though she suspected she was carrying drugs." (*Id.*) Judge Kozinski found the majority's view that defendant had no obligation to report her concerns "perfectly absurd." (*Id.*)

Finally, Judge Kozinksi found it "clear" that any error in giving the *Jewell* instruction was harmless because the evidence demonstrated that the defendant had actual knowledge of the marijuana. (Slip op. 14554-14555.) "It defies credulity to suggest that [defendant] was entrusted with 350 pounds of marijuana by a close relative, without being told what she was transporting." (*Id.* at 14555.) He criticized the majority for "contradict[ing] a long line of authority," by "purporting to conduct

harmless error analysis in the abstract, without looking at the record" and thereby "turning a *Jewell* error into structural error." (*Id.*)

V. ARGUMENT

A. THE MAJORITY'S DELIBERATE IGNORANCE RULING CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS.

1. The Majority Wrongly Held that If There Is Evidence Of Actual Knowledge, a *Jewell* Instruction Cannot Be Given.

The first flaw in the majority's opinion lies in its attempt to divorce "actual knowledge" from "deliberate ignorance." The majority concluded that the government cannot have it "both ways" and "*must* identify its theory or theories of the case[.]" (Slip op. 14538) (emphasis added). The majority stated that if evidence of actual knowledge was present, the government "was not entitled to a *Jewell* instruction." (*Id.* at 14542 n. 2). Thus, if there is evidence of actual knowledge, a *Jewell* instruction is, as a matter of law, now inappropriate.

This is patently incorrect. The central premise of ***Jewell*** is that deliberate ignorance is the functional equivalent of actual knowledge and they are "equally culpable" mental states. 532 F.2d at 700. Accordingly, this Court has consistently held that if there is evidence of *both* actual knowledge and of deliberate ignorance, a *Jewell* instruction is appropriate. *See* ***United States v. Shannon***, 137 F.3d 1112, 1117

(9th Cir. 1998) ("If the parties present evidence of actual knowledge as well as deliberate ignorance, a *Jewell* instruction is appropriate"); ***United States v. Perez-Padilla***, 846 F.2d 1182, 1183 (9th Cir. 1988) (per curiam) (same); ***United States v. Sanchez-Robles***, 927 F.2d 1070, 1074 (9th Cir. 1991) (same, relying on *Perez-Padilla*); ***United States v. Triplin***, 1994 WL 1968, **3 (9th Cir. 1994) (unpublished) ("[W]e must decide if this case presents circumstances of: (1) 'actual or no knowledge' or (2) 'actual knowledge and deliberate ignorance.' The latter applies").[2] *See also* ***United States v. Schnabel***, 939 F.2d 197, 204 (4th Cir. 1991); ***United States v. Hiland***, 909 F.2d 1114, 1131 (8th Cir. 1990) (following *Perez-Padilla*).

The majority also made clear that it disapproves of the government using deliberate ignorance as an alternative theory. (Slip op. 14547) ("the government should have tried this case straight up [as an actual knowledge case]"). Yet, it is precisely the shortcomings of circumstantial evidence regarding a defendant's mental state that justify using deliberate ignorance as a simultaneous alternative to an actual knowledge theory. This case is a perfect example, because in the absence of a full confession from the defendant that she knew about the marijuana, the circumstantial evidence could equally support a theory of deliberate ignorance or actual knowledge.

---

[2] Unpublished decisions may be cited to the Ninth Circuit "in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." Ninth Circuit Rule 36-3(b)(iii)).

Because both mental states are equally culpable and satisfy the *mens rea* requirement of the statute, there is no reason why the government should be forced to choose one theory over the other, and such a mandate is contrary to the decisions of this Court and other circuits.

2. The Majority Usurped the Role of the Jury, Thereby Creating a "Very Dangerous Precedent" That Conflicts With This Court's Decisions.

The majority also erred in taking an "all-or-nothing" approach to the defendant's testimony. By refusing to permit the jury to accept some, but not all, of the defendant's testimony, the majority contravened this Court's prior decisions in the very same *Jewell* context, holding that the jury is "entitled to believe all of [the witness's] story, none of her story, or part of her story," and "is not required to believe [the] defendant's self-serving testimony." (Slip op. 14551) (dissent) (citing cases).

The majority acknowledged that the "testimony at trial suggested that Heredia recognized the detergent smell," but claimed there was "no evidence that she knew that such odors can be used to mask the odor of marijuana." (Slip op. 14541.) The evidence, however, showed that the defendant did not believe her aunt's explanation for the smell and suspected drugs were in the car partly because of this detergent smell and her mother's actions in spraying air freshener and opening the window. (RT 3/12/03 45-46, 127-128, 138, 149; ER 26-27, 47-48, 58-59, 69.) Judge Kozinski

noted that "[t]he jury could have inferred" that Heredia's admitted suspicion occurred because she "knew that strong odors are used to mask the smell of concealed drugs." (Slip op. 14549.)

The majority likewise accepted at face value the defendant's claim that she "only became suspicious of criminal activity quite late" and "shortly before she arrived at the checkpoint," thereby concluding that she did not have a reasonable opportunity to check for the presence of drugs. (Slip op. 14545.) The majority impermissibly invaded the province of the jury. The jury could reasonably have found that the defendant's only conceivable motive for not trying to discover the marijuana and take steps to distance herself from the criminal activity (including by advising agents of her suspicions at the checkpoint) was precisely to avoid prosecution for herself and her associates, the very *Jewell* motive[3] that the majority found lacking. (Slip op. 14543-45.) As the dissent noted, it is "perfectly absurd" to believe that *Jewell* entitles someone who believes she has become involved in transporting drugs in her car to "continue abetting the criminal enterprise and helping ensure its success."

---

[3] While the majority noted that the instruction did not include the third element (slip op. 14543 n.3), the majority stopped short of finding that it was legally erroneous. Indeed, as the majority itself concedes, in a typical deliberate ignorance case it will be "obvious" that the defendant's motive in remaining ignorant is to provide protection from prosecution. (Slip op. 14543 n.3.) The desire to evade prosecution will obviously be an implicit goal of any person who is aware of the high probability that drugs are in the car and deliberately avoids learning the truth. (ER5.)

(Slip op. 14554.) The majority's one-sided treatment of the defendant's testimony improperly invaded the jury's province to decide credibility issues: "The jury here was entitled to accept as true the *fact* of Heredia's epiphany – which was contrary to her interest, and therefore likely to be true – but disbelieve her as to the *timing* of that realization." (Slip op. 14551) (emphasis in original).

Contrary to the majority's claim, there was "specific evidence" presented to support the deliberate ignorance instruction. The majority ignored this specific evidence in the erroneous belief that even though the defendant "possibl[y]" "lied in her testimony, and that the jury could be so persuaded," such untruthful testimony was "not the same as providing 'specific evidence' to support a *Jewell* instruction." (Slip op. 14546.) This is flatly wrong, because if a defendant's testimony is disbelieved, "this finding of untruthfulness can be considered positive evidence of the opposite to which . . . the defendant testified." ***United States v. Nicholson***, 677 F.2d 706, 709 (9th Cir. 1982); *see also* ***United States v. Cisneros***, 448 F.2d 298, 305 (9th Cir.1971) (defendants' testimony "may not only be disbelieved, but from the totality of the circumstances . . . including the manner in which they testify, a contrary conclusion may be properly drawn"); ***United States v. Scholl***, 166 F.3d 964, 979 (9th Cir. 1999). "The majority's figment that the jury was somehow bound to believe Heredia . . . not only conflicts with *Nicholson,* it creates a very dangerous precedent." (Slip op.

14551-52) (dissent).[4] By refusing to allow a *Jewell* instruction in a case which, as the dissent correctly observes is "a much stronger case than *Jewell* itself or any of [this Court's] other deliberate ignorance cases," slip op. 14548, the majority has for all practical purposes eliminated the government's use of the instruction, blunting an important, sanctioned tool in prosecuting drug cases.

B. THE MAJORITY'S HARMLESS ERROR RULING CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUITS, AND THE SUPREME COURT, BECAUSE THERE WAS SUFFICIENT EVIDENCE OF ACTUAL KNOWLEDGE.

The majority's harmless error analysis consisted of the following statement: "the district court should not have issued the *Jewell* instruction, and the error is not harmless. *See* Sanchez-Robles, 927 F.2d at 1075." (Slip op. 14546.) As Judge Kozinski correctly observed in his dissent:

> By purporting to conduct harmless error analysis in the abstract, without looking at the record or discussing the evidence, the majority contradicts a long line of authority, turning a *Jewell* error into structural error.

---

[4] The majority also misread this Court's "mere odor" cases, which recognize that a strong odor standing *alone* is insufficient to support a deliberate ignorance instruction, because it is not necessarily common knowledge that such scents are used to disguise the smell of drugs. *See, e.g.*, ***United States v. Baron***, 94 F.3d 1312, 1316-18 (9th Cir. 1996), and ***United States v. Sanchez-Robles***, 927 F.2d 1070, 1074-75 (9th Cir. 1991). As Judge Kozinski explains at length, this was not such a case. (Slip op. 14548-50.) The majority's ruling impermissibly extends the rule of *Baron* and *Sanchez-Robles* to preclude a *Jewell* instruction even when the evidence demonstrates that the odors made the defendant suspicious.

(Slip op. 14555.) Although error in giving a *Jewell* instruction can lead to reversal, prior to the majority's opinion, this Court had always reviewed the record for harmless error. *See, e.g.*, ***United States v. Beckett***, 724 F.2d 855 (9th Cir. 1984) (per curiam); ***United States v. Alvarado***, 838 F.2d 311 (9th Cir. 1988). *See also* ***Neder v. United States***, 527 U.S. 1, 8 (1999) ("most constitutional errors can be harmless"; the failure to instruct on an essential element of the crime is not a structural error).

The majority responded to the dissent by noting that the evidence was not "overwhelming" because the government otherwise would not have requested a deliberate ignorance instruction. (Slip op. 14547.) As established earlier in this petition, however, it was entirely proper for the government to proceed on both deliberate ignorance and actual knowledge theories if supported by the evidence. The majority wrongly treated the government's mere request for a *Jewell* instruction as self-evident proof that any error could not have been harmless.[5]

Moreover, by ruling that a *Jewell* error is reversible even if there is sufficient evidence of actual knowledge ("we must reverse even if . . . there might otherwise be sufficient evidence [that] Heredia actually knew of the marijuana"), slip op. 14538,

---

[5] The majority's concern that the *Jewell* instruction created the risk of convicting defendant on a theory of "negligence or even strict liability" cannot be squared with the charge that was given, which instructed that the jury could not find knowledge if it found "that the defendant actually believed that no drugs were in the vehicle . . . or . . . that the defendant was simply careless." (ER 5.)

the majority deepens a pre-existing circuit split by perpetuating a Ninth Circuit rule that is at odds with other circuits and the Supreme Court in ***Griffin v. United States***, 502 U.S. 46 (1991). Four circuits have held that instructing the jury on deliberate ignorance is harmless *per se*, as long as the evidence of actual knowledge is *sufficient*. *See* ***United States v. Adenji***, 31 F.3d 58, 63-64 (2nd Cir. 1994); ***United States v. Mari***, 47 F.3d 782, 786 (6th Cir. 1995); ***United States v. Scott***, 37 F.3d 1564, 1578 (10th Cir. 1994); and ***United States v. Stone***, 9 F.3d 934, 937-42 (11th Cir. 1993). This Court and the Eighth Circuit, however, have held that instructing a jury on deliberate ignorance constitutes harmless error only when the evidence of actual knowledge is *overwhelming*. *See* ***United States v. Barnhart***, 979 F.2d 647, 652 (8th Cir. 1992); ***Sanchez-Robles***, 927 F.2d at 1075; ***United States v. Mapelli***, 971 F.2d 284, 287 (9th Cir. 1992); ***United States v. Beckett***, 724 F.2d 855 (9th Cir. 1984) (per curiam).

Unlike the rule of this Court and the Eighth Circuit, the approach of the four other circuits is consistent with the decision in ***Griffin***, where the Supreme Court held that a general guilty verdict on a multi-object conspiracy charge was valid even though the evidence was insufficient as to one of the objects on which the jury was permitted to find the defendant guilty, because sufficient evidence supported the other object. 502 U.S. at 48-60. The Court explained that because jurors are "well equipped to analyze the evidence," there is no reason to believe that a jury will find

a defendant guilty on a factually inadequate theory when a factually adequate theory is presented to it. ***Id.*** at 59 (upholding verdict so long as the evidence "is *sufficient* with respect to *any one* of the acts charged") (emphasis added).

Here, under *Griffin*, even if the *Jewell* instruction was given in error, the evidence of actual knowledge was sufficient to sustain the verdict. As the majority itself recognized, the evidence of actual knowledge was sufficient in this case. *See* slip op 14547) (noting that the dissent's actual knowledge theory "will surely get the government to the jury"). The majority's observation that "[w]e have no way of knowing whether the jury convicted [defendant] on the basis of actual knowledge or deliberate ignorance" (slip op. 14538) is contrary to *Griffin*, conflicts with four other circuits, and contradicts the well-established proposition that jurors are presumed to follow their instructions. *See* ***Stone***, 9 F.3d at 938; ***Richardson v. Marsh***, 481 U.S. 200, 206 (1987).[6]

Because the evidence was, as the majority acknowledged, sufficient to convict on an actual knowledge theory, any *Jewell* error was harmless. ***Griffin***, 502 U.S. at 59-60; ***Stone***, 9 F.3d at 937-42. The majority's contrary conclusion is in conflict with

---

[6] This Court's cases that establish the "overwhelming evidence" standard do not address *Griffin*. *See, e.g.*, ***Sanchez-Robles***, 927 F.2d at 1075; ***Mapelli***, 971 F.2d at 287; ***Beckett***, 724 F.2d at 856; ***United States v. Aguilar***, 80 F.3d 329, 333-34 (9th Cir. 1996) (en banc).

the law in four other circuits and the Supreme Court, and contradicts the presumption that juries follow their instructions. Rehearing en banc is clearly warranted.

VI. CONCLUSION

For the foregoing reasons, the government respectfully asks this Court to grant its petition for rehearing en banc.

PAUL K. CHARLTON
United States Attorney
District of Arizona

CHRISTINA M. CABANILLAS
Appellate Chief

GEORGE FERKO
Assistant U.S. Attorney

VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 35-4 AND 40-1 FOR CASE NO. 03-10585

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing / petition for rehearing en banc is: (check applicable option)

__X__ Proportionately spaced, has a typeface of 14 points or more and contains __4198__ words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

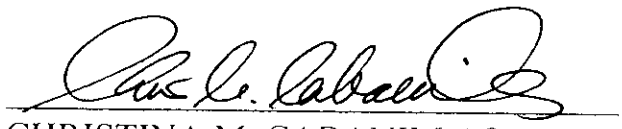
____ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

January 6, 2006
Date

Signature of Attorney

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2006, I caused the Appellee's Petition for Rehearing and Rehearing En Banc to be served by causing two copies of the petition to be mailed, postage prepaid, to Wanda K. Day, Esq., 405 N. Court Avenue, Tucson, Arizona 85701, counsel for defendant-appellant.



CHRISTINA M. CABANILLAS
Assistant U.S. Attorney

C.A. No. CA-03-10585

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARMEN HEREDIA,

Appellant/Defendant,

v.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

Published Opinion Filed October 24, 2005
(Bybee, W. Fletcher; Kozinski, dissenting)

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

WANDA K. DAY
ATTORNEY AT LAW
BOX 86840
TUCSON, ARIZONA 85754-6840
TELEPHONE: (520) 791-9630
FACSIMILE: (520) 791-7939

ATTORNEY FOR APPELLANT/DEFENDANT
CARMEN HEREDIA

1. TABLE OF CONTENTS

AUTHORITIES CITED

Cases

III. STATEMENT OF THE CASE

Pursuant to this Court's order of January 31, 2006, Appellant Carmen Heredia files her response to Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. For the reasons set forth below, the petition should be denied.

In a published decision, the panel in this case held that the government did not provide sufficient evidence to warrant the deliberate ignorance instruction and reversed the district court's denial of Appellant's motion for a new trial. ***United States v. Heredia***, 426 F.3d 1226 (9th Cir. 2005) The panel's decision is consistent with the decisions of this Court, the United States Supreme Court, and with the decisions of other circuits who have considered the question in light of the facts of this case. Further review is unwarranted.

The panel majority correctly applied precedent concerning the deliberate ignorance jury instruction. Additionally, the Majority's harmless error analysis is a correct application of the law as it is applied to the facts of this case.

IV. FACTS AND GOVERNMENT'S ARGUMENT

A. Statement of Facts

Appellant Carmen Heredia drove a Grand Marquis sedan belonging to her Aunt Belia through a border patrol checkpoint north of Nogales, Arizona on February 25, 2002 around 6:30 p.m. (RT 3/11/03 46 & 83; SER 7 & 44) Riding with Ms. Heredia

in her Aunt Belia's Grand Marquis that night were her mother Raquel Moreno, her Aunt Beatriz Moreno and her two very young children. (RT 3/11/03 94; SER 55; RT 3/12/02 110; SER 138, RT 3/11/02 46; SER 7)

The border patrol agent who spoke to Ms. Heredia at the checkpoint noticed a perfume smell coming from inside the vehicle. (RT 3/11/03 48; SER 9) The vehicle was referred to secondary inspection where a drug dog alerted to the car's trunk. (RT 3/11/03 84; SER 45) At the secondary inspection, a border patrol agent asked Ms. Heredia if he could look into the trunk and she consented. She tried to open the trunk with the ignition key but it would not unlock the trunk. She then tried to open the trunk by pushing a button on the driver's side door. Although the button was designed to open the trunk, the button did not open the trunk. (RT 3/11/03 87-88; SER 48-49) In order to access the trunk, agents had to go through the back seat. When they got into the trunk, they found bundles of marijuana. (RT 3/11/03 51; SER 12) They also found an empty perfume bottle on the front floorboard. (RT 3/11/03 56; SER 17)

Ms. Heredia voluntarily spoke with Agent Garceau. She told him she did not know there was marijuana in the trunk. She said she smelled a strong detergent smell in the car and her aunt had told her she had spilled detergent in the car. Further, Ms. Heredia did not believe her aunt's explanation. (RT 3/11/03 94; SER 55, RT 3/12/02

45; ER 26)

As she was driving on Highway I-19 towards Tucson, Ms. Heredia started to get a bad feeling because of the way her aunt and her mother were acting. (RT 3/12/02 46; ER 27) Her mother sprayed air freshener in the car. Ms. Heredia was also suspicious because her mother was not working and yet seemed to have a lot of cash and had money to pay her rent and utilities. As the trip progressed, she became more concerned and thought about getting off the highway but she had already passed the last exit before the checkpoint and drove into the line for the checkpoint. (RT 3/12/02 138-139; ER 58-59)

Ms. Heredia borrowed the Grand Marquis she was driving from her Aunt Belia to drive back to Tucson from Nogales. Aunt Belia gave Ms. Heredia only one key, the ignition key, when she loaned her the car. Ms. Heredia did not know that the ignition key would not open the trunk. (RT 3/12/03; ER 61) There was no key in the car nor on any of the car's occupants that would open the trunk. (RT 3/11/03 101; SER 62)

When he approached the vehicle, Agent Garceau did not smell any odors. It was not until he had leaned into the back seat that he smelled a detergent odor. (RT 3/11/03 98; SER 59) Even when Agent Garceau got into the vehicle he did not smell any marijuana odor and he testified that an occupant of the vehicle would not have smelled marijuana. (RT 3/11/03 104; SER 65)

The stories told by Ms. Heredia's mother and two aunts during their testimony were inconsistent with each other, with Ms. Heredia's testimony and oftentimes each witness contradicted themselves. (Slip op. 14534-14535)

The testimony of the aunts and the mother was generally antagonistic to Ms. Heredia. As the majority noted: "[c]ollectively, the testimony offered by Beatriz, Belia and Heredia's mother, Raquel, suggested that Heredia or her husband could have been responsible for the marijuana in the vehicle." (Slip op. 14535)

The dissent makes much of the close family relationship Ms. Heredia had with the passengers in the car as proof that the family must have told her there was marijuana in the trunk prior to giving her the car. (Slip op. 14555) However in the typical *Jewell* case the driver is entrusted with drugs by a stranger and not told there are drugs in the car or in the suitcase. Also, the evidence is that Ms. Heredia is not very close to her aunt and mother; her mother had not even seen her from the day of the arrest until the trial, over a year later. (ER 127-128, SER 113) As the Majority states, in most of the cases where a deliberate ignorance instruction is appropriate, the defendant is approached by a stranger or an acquaintance. (Slip op. 14541)

In addition, this case is significantly different than the usual case because Ms. Heredia's suspicions did not arise immediately. (Slip op. 14544) Her suspicions arose as she approached the checkpoint and she had no options other than driving

through the checkpoint. (RT 3/12/03 46, ER 27)

The dissent is under the impression that the time it takes to travel from Nogales to the checkpoint is 90 minutes and thus the journey to the checkpoint would have been a lengthy journey. (Dissent at 14552) A closer look at the record does not support that conclusion. While Border Patrol Agent Garceau testified that the Grand Marquis came through the checkpoint at approximately 6:30 (RT 3/12/03 83) and Ms. Heredia testified that her aunt got to the house before 5:00 and that made it possible for them to leave, no witness testified that they left for Tucson at 5:00 p.m. (RT 3/12/03 136)

The checkpoint is at kilometer 25 near the town of Rio Rico. (RT 3/11/03 83 and 44) The record is silent regarding the location of the town of Rio Rico in relation to Nogales. Appellant asks this Court to take judicial notice that Rio Rico is approximately fourteen miles north of Nogales. An appellate court may take judicial notice of evidence not submitted to the District Court. *See* ***Lobatz v. U.S. Cellular of Cal., Inc.***, 222 F.3d 1142, 1148 (9th Cir.2000) For the following reasons, it is appropriate for this Court to take judicial notice of the location of the town of Rio Rico: 1) trial counsel may not have realized the importance of presenting evidence of the location of Rio Rico to a jury or even to the District Court Judge because of local familiarity with the location of Rio Rico; 2) this tribunal is under a mistaken

impression that the checkpoint is ninety minutes from Nogales; and 3) the location of a town is a fact of common knowledge.

Given the short distance from Nogales to the checkpoint, the time for Ms. Heredia to gather the knowledge that prompted her suspicions that criminal activity may be afoot was very short. The Dissent's statement that the jury could have found that she developed her suspicion long before she got to the checkpoint is not based on the true facts of the case.

B. Government's Argument

The government conceded several times that its proof of the knowledge element of the charge was based on deliberate ignorance and not actual knowledge. In the Government's Response to Defendant's Motion for New Trial, the government states: The evidence points to deliberate ignorance, not to actual knowledge of illegality. (ER 16) At the hearing on Appellant's Motion for New Trial, the government stated:

> But I remember specifically saying to the jury that my theory was that one of the ways to prove knowledge is through deliberate ignorance, and that was my argument, that the defendant had knowledge via the deliberate ignorance instruction. That's what I remember arguing to the jury. I don't remember going up there and telling the jury you can find either actual knowledge or deliberate ignorance.

(SER 158-159)

The government's closing and rebuttal arguments urged only deliberate ignorance as the means of proving the knowledge element of the charge:

> But if you look at what, in fact, she is saying and what, in fact, she did, her actions in this case, she screams out deliberate ignorance. . . . She had more than enough time to learn the truth, but she avoided it, because she was hoping that if she did not ask the final question, then you wouldn't be able to convict her, because you wouldn't be able to say: Oh, she knew. (AER 19-20) . . . . As far as the deliberate ignorance instruction, defense counsel says, we cannot make up our mind – we being the government. Did she know or was she deliberately ignorant? She knew because she was trying to be deliberately ignorant. This is not inconsistent. That is not a shotgun theory. The instruction itself says you can find a defendant acted knowingly. That is just another way of proving that a person acted knowingly, so we use the legal term of art. . . . One of the ways to prove knowingly is through deliberate ignorance. This is a high probability there was drugs, but she avoided learning the truth. . . . Please rely on your memory as far as what exactly she told the agents, but there is deliberate ignorance in this case. She purposely avoided trying to learn the [sic] about what was happening, hoping you would find that that is not sufficient to find her guilty. . . . (AER 63-65)

Even the Court acknowledged that the government was not making a claim of actual knowledge by stating at the close of the evidence:

> The government does not claim that the evidence shows actual knowledge but rather suspicion on behalf of the defendant's behalf (sic) and she is driving the vehicle.

(SER 188)

The government is now asking this Court to conclude that there was sufficient evidence of actual knowledge presented at trial to survive a harmless error analysis

when the prosecutor trying the case, listening to the evidence first hand, observing the demeanor of the witnesses and being able to evaluate the credibility of the testimony didn't even believe there was enough to argue that position in her closing.

V. ARGUMENT

A. The Majority's Deliberate Ignorance Ruling Is Consistent with Prior Decisions of This Court And Other Circuits

The *Baron* decision set forth the standard for determining whether the "deliberate ignorance" instruction is appropriate:

> The instruction should be given only when the government presents specific evidence showing that a defendant (1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution.

United States v. Baron, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996). This Court and other Circuits have consistently insisted that foundational requirements be met before a deliberate ignorance instruction can be given. ***U.S. v. Jewell***, 432 F.2d 697 (9th Cir. 1976)("It is worth emphasizing that the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance"). ***U.S. v. Alvarado***, 838 F.2d 311, at 314(9th Cir. 1988)(government must present evidence supporting an inference that [the defendant] purposely avoided obtaining actual knowledge that the suitcase

contained the cocaine) citing ***U.S. v. Nicholson***, 677 F.2d 706, 711 (9th Cir. 1982)(defendant avoided learning that the $20,000 he delivered to drug dealers in a cash in a brown bag at night was to be used for drug smuggling), ***U.S. v. Aguilar***, 80 F.3d 329, 332 (9th Cir. 1996)(absent the required evidence, the jury might impermissibly infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance).

The Tenth Circuit found reversible error when no evidence was presented to show that the defendant's conduct included deliberate acts to avoid actual knowledge that a car he was paid to drive cross-country contained hidden narcotics. ***United States v. de Francisco-Lopez***, 939 F.2d 1405 (10th Cir. 1991)

Other circuits have required that the foundational requirements for the instruction be met. The foundation requires sufficient evidence to allow a rational juror to conclude "beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." ***U.S. v. Adeniji***, 31 F.3d 58, 62 (2d Cir. 1994), ***U.S. v. Boothe***, 994 F.2d 63, 69 (2d Cir. 1993) (quoting ***U.S. v. Lanza***, 790 F.2d 1015, 1022 (2d Cir.) *cert. denied*, 479 U.S. 861, 107 S.Ct. 211, 93 L.Ed.2d 141 (1986)), ***U.S. v. Rodriguez***, 983 F.2d 455, 458 (2d Cir. 1993), ***U.S. v. Pedersen***, 244 F.3d 385,395 (5th Cir. 2001) (proof of a purposeful contrivance to avoid learning of the illegal conduct is a required

foundation for the deliberate ignorance instruction), ***U.S. v. Rivera***, 944 F.2d 1563, 1571(11th Cir. 1991)(adopting the 9th Circuit foundational requirements for giving the instruction)

Appellee argues that specific evidence may be in the form of the testimony of Appellant that may not be truthful, thus providing evidence of the opposite of her testimony. Appellee is asking this Court to find that the absence of evidence is equal to the presentation of evidence. The standard is the presentation of specific evidence. That standard has not been met. (Slip op. 14546, *See* ***U.S. v. Sanchez-Robles***, 927 F.2d 1070, 1075(9th Cir. 1991)

Appellee asserts that the foundational requirements were met by the presentation of "specific evidence" in the form of actions Ms. Heredia could have taken to find out whether the Grand Marquis contained contraband. Yet no evidence was presented showing she deliberately avoided learning the truth. Given the facts of this case – the short duration of the trip, the darkness of the night, the busy controlled-access interstate highway, the presence of two young children, the relationship of the two who she suspected of criminal activity (mother and aunt), coupled with the arising of suspicion late in the journey, the only real opportunity for inquiry would have been at the checkpoint. The Dissent asserts it is incumbent on Appellant to turn her mother and her aunt over to the authorities in the hopes of

saving herself from arrest. Such a requirement is unrealistic. As the Majority stated: [w]e decline to impose upon a defendant in these circumstances the legal duty either to place her family in great physical danger or to voluntarily report her suspicions in order to avoid a *Jewell* instruction. (Slip op. 14546)

B. Appellee's Argument That The Majority Found That If There Is Evidence of Actual Knowledge, a *Jewell* Instruction Cannot Be Given Misstates The Court's Ruling

Appellee states in the Petition for Rehearing and Request for Rehearing En Banc that the Opinion says: "if evidence of actual knowledge was present, the government 'was not entitled to a *Jewell* instruction'" and then emphasizes its point: Thus if there is evidence of actual knowledge, a *Jewell* instruction is, as a matter of law, now inappropriate. (PRSR, p.9) The government's characterization of the Majority's opinion is wrong. The majority opinion states:

> Thus, the government must identify its theory or theories of the case: if the government's evidence supports **only** actual knowledge and not deliberate ignorance, then it may not obtain a *Jewell* instruction. (Slip op. 14538) (emphasis added)

In this case, under these facts, the Majority is rightly concerned that Ms. Heredia may have been convicted under a theory that should not have been presented to the jury. The Court cannot determine whether the conviction is based on the illegitimate theory of deliberate ignorance or not. Since the government did not even

argue actual knowledge, it is likely the conviction is based on deliberate ignorance.

C. The Majority's Harmless Error Analysis Is Consistent With Rulings Of This Court, The Supreme Court And Other Circuits Based On The Facts Of The Instant Case

Once a Court finds that the deliberate ignorance instruction was given in error, the Court determines whether it was harmless error to give the instruction. The rulings of the Circuits are not inconsistent when the facts of the cases are taken into consideration. A review of the cases relied on by the government distinguishes each case.

In ***U.S. v. Adeniji***, 31 F.3d 58 (2nd Cir. 1994) the Court found the lack of evidence of conscious avoidance would have precluded the jury from convicting on conscious avoidance grounds. In our case, Appellant admitted she suspected drugs were in the car, therefore she could have been convicted on that theory even though the foundation requirements were not met. In ***Adenji*** since there was no evidence of conscious avoidance, the jury would not have convicted on that theory.

In ***U.S. v. Mari***, 47 F.3d 782, 785(6th Cir. 1995) the Sixth Circuit considered whether giving the deliberate ignorance instruction was harmless error and determined that it was. As in *Adenji, Mari* is distinguished because Mari didn't even claim suspicion. The presentation of sufficient evidence of actual knowledge upheld

the conviction.

Importantly the Sixth Circuit distinguished its deliberate ignorance jurisprudence from that of the Eighth and Ninth Circuits because the language of the instruction is different. The Sixth Circuit instruction contains the following language: Carelessness or negligence or foolishness on [the defendant's] part is not the same as knowledge and is not enough to convict. *Id.* at 785. The instruction given in the instant case does not refer to to negligence. The harmless error analysis differs because there is the possibility of a conviction based on negligence.

In ***U.S. v. Scott,*** 37 F.3d 1564 (10th Cir. 1994) there were multiple defendants and the jurors were instructed to consider each defendant and each charge separately. The jurors knew that some of the instructions may not apply to all defendants. In addition, the Tenth Circuit distinguished its finding in a manner similar to the Sixth Circuit in *Mari:* a deliberate ignorance instruction may be harmless error if the instruction itself does not imply that negligence or mistake is enough to support a conviction and does not shift the burden to the defendant to prove his innocence. *Scott* at 1578.

Appellee also cites to ***U.S. v. Stone,*** 9 F.3d 934 (1993) in support of its argument that the Eleventh Circuit is in conflict with the Ninth regarding harmless error. *Stone* is factually distinct. In *Stone* the defendant, an inmate in a prison, was

convicted of filing a false claim for an income tax refund. *Stone* is factually distinct from the instant case because in *Stone* the defendant received a check and deposited it in his inmate account. At a minimum Stone knew that the money was not rightfully his. Either way he received a benefit to which he knew he was not entitled. The facts are distinct from our case.

In a case not discussed by the government, the Eighth Circuit focused on the quantity of evidence of actual knowledge. In ***U.S. v. Stiles***, 116 F.3d 481 (8th Cir. 1997)(unpublished) and found the overpowering evidence of Stiles' guilt made any error in giving the instruction was harmless. Stiles directed his partner to the exact location of the methamphetamine hidden in the rental car trunk and told his partner to "shut up" when the police arrived; he and his partner were videotaped by police retrieving a large package of meth from the trunk of a rental car parked at the airport.

Appellee relies on ***Griffin v. United States***, 502 U.S. 46 (1991) to support its harmless error analysis. *Griffin* is easily distinguished from the case at bar because in *Griffin* there was adequate evidence to convict on the alternate ground. In the instant case, as the Majority stated: "[w]e quite disagree that the evidence was "overwhelming" that Heredia "actually knew" about the marijuana. That is precisely why the government requested a *Jewell* instruction: because the government had insufficient evidence to prove "overwhelming[ly]" who put the marijuana in the

trunk or who else knew about it." (Slip op. 14547) As stated earlier, even the prosecutor trying the case did not believe there was sufficient evidence to go forward on an actual knowledge basis.

In *Griffin* reversal was sought because the evidence did not support one of the two possible theories of conviction presented to the jury. *Griffin* is inapposite in this case because it is limited to statutory alternatives charged in the conjunctive. In the present case, the trial court's instructions to the jury were predicated on an information that charged the defendant disjunctively. Either she knew there was marijuana in the car or she didn't know and was merely suspicious. Therefore the *Griffin* analysis does not apply.

Here one of the possible bases of conviction was legally inadequate because the instruction was given in error. ***Yates v. United States***, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (a general verdict must be overturned when one of the possible bases of conviction is *legally* inadequate). The instant case falls in the *Yates* not the *Griffin* line.

V. CONCLUSION

For all the foregoing reasons, the petition for rehearing and rehearing en banc should be denied.

Wanda K Day

Wanda K. Day, Attorney for Appellant

VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P. 35-4 AND 40-1 FOR CASE NO. 03-10585

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Response to Petition for Panel Rehearing / Petition for Rehearing En Banc is:

__xx___ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words).

or

_____ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text)

or

_____ In compliance with Fed.R.App.P. 32 c does not exceed 15 pages.

Dated this 10th day of March, 2006.

Wanda K. Day

VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2006, I caused the Appellant's Response to Petition for Rehearing and Suggestion for Rehearing En Banc to be served by causing two copies of the Petition to be mailed, postage prepaid to George Ferko, Assistant United States Attorney, 405 W. Congress, Tucson, AZ 85701, counsel for Appellee.

Wanda K. Day